

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DIANE ALVAREZ,

Plaintiff,

v.

TARGET CORPORATION, a
Minnesota corporation,

Defendant.

NO: 13-CV-0150-TOR

ORDER GRANTING DEFENDANT
TARGET CORPORATION'S
MOTION TO DISMISS PURSUANT
TO FRCP 12(b)(6) AND GRANTING
LEAVE TO AMEND COMPLAINT

BEFORE THE COURT is Defendant Target Corporation's Motion to Dismiss Pursuant to FRCP 12(b)(6). ECF No. 12. This matter was heard with oral argument on July 8, 2013. Michael J. Casey appeared on behalf of the Plaintiff. Farron D. Curry and Roman D. Hernandez appeared on behalf of Defendant. The Court has reviewed the briefing and the record and files herein, had the benefit of oral argument, and is fully informed.

BACKGROUND

Plaintiff Diane Alvarez filed a Complaint in Spokane County Superior Court

ORDER GRANTING DEFENDANT TARGET CORPORATION'S MOTION TO DISMISS ~ 1

1 on March 24, 2103. She alleged claims against Defendant Target Corporation,
2 including: outrage, blacklisting, violations of the Washington Consumer Protection
3 Act (“CPA”) RCW 19.86.020 and RCW 19.86.030, civil conspiracy, breach of
4 promise, and negligent infliction of emotional distress. *See* ECF No. 1. Defendant
5 properly removed the action to this Court on April 18, 2013. Presently before the
6 Court is Defendant’s motion to dismiss all claims pursuant to FRCP 12(b)(6).

7 FACTS

8 The following facts are drawn from Plaintiff’s Complaint and attached
9 exhibits. *See* ECF No. 1 (“Compl.”) at 6-22. Plaintiff was employed as a cashier
10 by Defendant for a number of years. In September and October of 2012,
11 Defendant conducted an investigation, including video surveillance, which
12 revealed that on occasion Plaintiff would hit incorrect keys on the cash register,
13 thereby ringing up merchandise as if purchased with cash, without taking any cash
14 from the customer or charging the customers’ credit cards. These actions resulted
15 in approximately \$5,000 of merchandise being removed from the store without
16 payment.

17 On October 25, 2012, Plaintiff was called into “the Office” and allegedly
18 told that she had been under investigation since May, that they “already knew what
19 the answers are,” and “we have been watching you for months.” Compl. at ¶ 3.3.
20 Defendant’s employees told Plaintiff that she had been hitting incorrect register

1 keys, which resulted in about \$5,000 of unpaid merchandise leaving the store.
2 Plaintiff did not dispute the amount of loss and acknowledged that “she obviously
3 made some mistakes at the cash register.” *Id.* at ¶¶ 3.5- 3.6. However, Plaintiff
4 repeatedly denied any accusation of being in a “theft ring” or party to any theft or
5 fraud. *Id.* at ¶ 3.6. According to Plaintiff, she was told she was immediately
6 “terminated for fraud,” but that she “would not be arrested” and she was “not
7 banned from the store.” *Id.* at ¶ 3.7. On this same day, Plaintiff called the Target
8 Employee Hotline to file a report. On October 31, 2012, she received a call from
9 Gigi Edwards in Defendant’s legal department who allegedly told her that the
10 Defendant employee should not have said she was terminated for fraud; instead,
11 Ms. Edwards told Plaintiff that she was “terminated for negligent conduct because
12 of substantial loss since May 2012 and Defendant will not fight unemployment.”
13 *Id.* at ¶ 3.9.

14 After her termination, Plaintiff applied to the Washington Employment
15 Security Department (“ESD”) for unemployment benefits. The reason given by
16 Plaintiff for termination was that she was “wrongfully accused of fraud after
17 failing to follow sales and credit card procedures.” *Id.* at ¶ 3.12, Ex. B. On
18 November 5, 2012, TALX Corporation (“TALX”), an agent of Defendant, sent a
19 letter to ESD requesting “relief of benefit charges and/or a determination of
20 [Plaintiff’s] eligibility.” *Id.* at Ex. A. The letter stated that Plaintiff “was

1 discharged due to gross misconduct” and “was found to have processed transaction
2 [sic] where customers left the store with merchandise they had not paid for causing
3 a loss of \$5,400.” *Id.* TALX also attached a copy of company policy that defined
4 “gross misconduct” as including a variety of actions, with the portion labeled
5 “theft” circled.¹ *Id.*

6 On November 14, 2012 ESD sent TALX an email entitled “Expert Fact
7 Finding” that included eleven follow-up questions requesting additional
8 information regarding the alleged misconduct at the cash register in order to decide
9 Plaintiff’s eligibility for unemployment benefits. *Id.* at Ex. B. The email stated
10 that failure to respond would result in “a decision based on the available
11 information.” *Id.* It is undisputed that TALX did not respond to the eleven
12 questions posed by ESD in the Expert Fact Finding email. Rather, TALX attached
13

14 ¹ Defendant’s company policy generally defines gross misconduct as: “Misuse of
15 the Employment Relationship or the Company’s Property, Credit, or Services.
16 Obtaining or using any property or services of the company, a fellow team
17 member, a guest, a visitor or a vendor in a manner other than that authorized by
18 company policy or by Federal, State or Local Laws.” Compl. at Ex. A. The policy
19 then goes on to identify specific conduct that would qualify as gross misconduct
20 including theft, fraud, and many other actions. *Id.*

1 a letter identical in content to the letter previously sent to ESD on November 5,
2 2012. *Id.* at Ex. C.

3 Despite Defendant's challenge, ESD found that Plaintiff was entitled to
4 unemployment benefits, and she continued to receive benefits until she began
5 attending community college and received financial assistance from an educational
6 grant. *Id.* at ¶ 3.13. On March 4, 2013 Plaintiff alleges she received a letter from
7 Defendant's law firm stating that Defendant had the legal right to sue for civil
8 damages, separate from any criminal penalties which may have been pursued by
9 local law enforcement, and the "amount that our client has authorized us to accept
10 as full, final settlement of all claims against you is \$463.09." *Id.* at ¶ 3.14. On
11 March 6, 2013 Defendant allegedly offered to pay \$2,000 in exchange for a full
12 release of Plaintiff's claims against Defendant. *Id.* Plaintiff acknowledges that she
13 was an at-will employee and is asserting claims only related to post-termination
14 actions by Defendant and not any claim of wrongful termination. *Id.* at ¶ 3.15.

15 DISCUSSION

16 A. Standard of Review

17 To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint
18 must set forth factual allegations sufficient "to raise a right to relief above the
19 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The
20 tenet that a court must accept as true all of the allegations contained in a complaint

1 is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause
2 of action, supported by mere conclusory statements, do not suffice. *Id.* (“Although
3 for the purposes of a motion to dismiss we must take all of the factual allegations
4 in the complaint as true, we are not bound to accept as true a legal conclusion
5 couched as a factual allegation” (internal quotation marks omitted)). A pleading
6 that offers “labels and conclusions” or “a formulaic recitation of the elements of a
7 cause of action will not do.” *Id.*

8 Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a
9 “short and plain statement of the claim showing that the pleader is entitled to
10 relief.” The pleading standard set by Rule 8 of the Federal Rules of Civil
11 Procedure “does not require ‘detailed factual allegations,’ but it demands more
12 than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v.*
13 *Iqbal*, 556 U.S. 662, 678 (2009). Rule 8 marks a notable and generous departure
14 from the hyper-technical, code-pleading regime of a prior era, but it does not
15 unlock the doors of discovery for a plaintiff armed with nothing more than
16 conclusions. *Id.* at 678-79. In assessing whether Rule 8(a)(2) is satisfied, the
17 Court first identifies the elements of the asserted claim based on statute or case
18 law. *Id.* at 678. The Ninth Circuit follows the methodological approach set forth
19 in *Iqbal* for the assessment of a plaintiff's complaint:

20 “[A] court considering a motion to dismiss can choose to begin by
identifying pleadings that, because they are no more than conclusions, are

1 not entitled to the assumption of truth. While legal conclusions can provide
 2 the framework of a complaint, they must be supported by factual allegations.
 3 When there are well-pleaded factual allegations, a court should assume their
 veracity and then determine whether they plausibly give rise to an
 entitlement to relief.”

4 *Moss v. U.S. Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009) (*quoting Iqbal*, 129
 5 S.Ct. at 1950).

6 **B. Outrage/Intentional Infliction of Emotional Distress**

7 To establish the tort of outrage, a plaintiff must show “(1) extreme and
 8 outrageous conduct, (2) intentional or reckless infliction of emotional distress, and
 9 (3) severe emotional distress on the part of the plaintiff.” *Reid v. Pierce County*,
 10 136 Wash.2d 195, 202 (1998). It is not enough that that the defendant acted with
 11 tortious or criminal intent, nor will liability extend “to mere insults, indignities,
 12 threats, annoyances, petty oppressions, or other trivialities.” *Grimsby v. Samson*,
 13 85 Wash.2d 52, 59 (1975). Rather, the conduct must be “so outrageous in
 14 character, and so extreme in degree, as to go beyond all possible bounds of
 15 decency, and to be regarded as atrocious, and utterly intolerable in a civilized
 16 community.” *Id.* The question of whether defendant’s conduct was sufficiently
 17 outrageous is normally left to the jury. *Dicomes v. State*, 113 Wash.2d 612, 630
 18 (1989). However, “it is initially for the court to determine if reasonable minds
 19 could differ on whether the conduct was sufficiently outrageous to result in
 20 liability.” *Id.* Factors the court may consider in determining whether the conduct is

1 sufficiently outrageous include: the position occupied by defendant; whether the
2 plaintiff was particularly susceptible to emotional distress and if defendant knew
3 that fact; the degree of the severity of the emotional distress as opposed to
4 annoyance, inconvenience or embarrassment; and “the actor must be aware that
5 there is a high probability that his conduct will cause severe emotional distress and
6 he must proceed in a conscious disregard of it.” *Phillips v. Hardwick*, 29 Wash.
7 App. 382, 388 (1981).

8 In support of her outrage claim, Plaintiff alleges that Defendant violated four
9 criminal statutes and did so “contra to public interest.” ECF No. 13 at 5-6. The
10 statutes include: (1) RCW 50.36.010 (“it is a crime for employers or agents to
11 knowingly give any false information or withhold any material information during
12 the unemployment process”); (2) RCW 50.36.020 (“it is a crime for any person to
13 willfully attempt in any manner to evade or defeat any contribution”); RCW
14 50.36.030 (“it is a crime to conceal the true cause of discharge by giving a reason
15 at separation different than a reason later given to the State”); and RCW 49.44.010
16 (blacklisting). Plaintiff appears to argue that the alleged commission of these
17 violations, i.e. falsely accusing Plaintiff of theft and fraud in the letters sent to
18 ESD, plausibly states a claim of outrage.² Defendant contends that Plaintiff’s

19 ² Plaintiff argues her case is analogous to *Corey v. Pierce County*, in which a chief
20 deputy prosecutor was falsely and publically accused of criminal behavior (i.e.

1 Complaint fails to allege facts sufficient to satisfy the elements of the claim, most
2 particularly, facts establishing that the conduct at issue was extreme and
3 outrageous conduct. The Court agrees. Plaintiff's Complaint alleges that
4 Defendant "falsely stated to ESD that [she] was terminated for being a thief and a
5 fraudster." Compl. at ¶ 4.3. The letter sent by Defendant to the ESD actually
6 states that Plaintiff was "discharged due to gross misconduct," and "was found to
7 have processed transaction [sic] where customers left the store with merchandise
8 they had not paid for causing a loss of \$5,400." *Id.* at Ex. A. Defendant also
9 attached a copy of the definition of "gross misconduct" according to its internal
10 company policy, with the word theft circled and no further comment or allegation
11 by Defendant as to the precise reason for Plaintiff's termination.

12 While Defendant's conduct may certainly be interpreted as insulting to
13 Plaintiff's sensibilities, the Court finds that reasonable minds could not differ as to
14 mishandling public funds) by her boss in newspaper articles, despite knowledge
15 that an internal investigation revealed little support for that claim. 154 Wash. App.
16 752, 764 (Ct. App. 2010). In *Corey*, the court found that "[a]s a prosecutor and
17 longtime public servant, such allegations would be particularly loathsome to
18 [plaintiff] and go beyond the 'mere insults and indignities' of *Dicomes*." *Id.*
19 However, the instant case is distinguishable in that Plaintiff is not a public figure,
20 nor is there any evidence that the letter to the ESD was published in any form.

1 whether the conduct was sufficiently extreme to be utterly intolerable in a civilized
2 society. Plaintiff offers no authority to support the claim that alleged violation of
3 the identified criminal statutes is automatically sufficient to constitute extreme and
4 outrageous conduct. *See* ECF No. 13 at 6-7; *But see Grimsby*, 85 Wash.2d at 59
5 (“it is not enough that a ‘defendant has acted with an intent which is tortious or
6 even criminal”).

7 Likewise, the Court rejects classifying “when Target threatened to sue
8 [Plaintiff] while at the same time offering to settle her claims for a pittance,” as
9 extreme and outrageous conduct. Compl. at ¶ 4.4.

10 Moreover, based on Plaintiff’s factual allegations in her Complaint, none of
11 the factors identified in *Phillips* support a finding that Defendant’s conduct was
12 sufficiently outrageous. *Phillips*, 29 Wash. App. at 388. Plaintiff was no longer an
13 employee of Defendant, there is no evidence that defendant knew plaintiff was
14 particularly susceptible to emotional distress, and the severity of the emotional
15 distress does not appear to rise above embarrassment. *See id.* For all of these
16 reasons, the Court finds Plaintiff fails to plead sufficient facts to support a
17 plausible claim of outrage.

18 **C. Blacklisting**

19 Under RCW 49.44.010, Washington’s criminal “blacklisting” statute, it is
20 unlawful *inter alia* to:

1 wilfully and maliciously, send or deliver, **or make or cause to be made, for**
2 **the purpose of being delivered or sent**, ... any paper, letter, or writing,...
3 or publish or cause to be published any statement **for the purpose of**
4 **preventing any other person from obtaining employment** in this state or
elsewhere, ... or who shall wilfully and maliciously make or issue any
statement or paper that will tend to influence or prejudice the mind of any
employer against the person of such person **seeking employment**....

5 Wash. Rev. Code § 49.44.010 (emphasis added). Washington courts have recently
6 determined that the blacklisting statute is a sufficient basis for a civil cause of
7 action. *See Moore v. Commercial Aircraft Interiors*, 168 Wash. App. 502, 515
8 (2012).

9 The Court notes that the precise contours of a civil blacklisting claim have
10 not been widely analyzed in case law. Thus, it is perhaps not surprising that the
11 parties accuse each other of attempting to “stretch” the statute or “add” elements
12 beyond the intent of the legislature. *See id.* (noting the statute was enacted in 1899
13 to prevent railroad union busting). Defendant argues that Plaintiff has not alleged
14 facts showing that Defendant or its agent published or circulated her name for the
15 purpose of preventing her from securing employment, nor that it did so in a wilful
16 or malicious manner.³ ECF No. 12 at 9. Plaintiff contends that Defendant has
17 imposed additional burdens, not included in the statute, requiring her to allege that
18 Defendant’s statements to the ESD were published or made public. ECF No. 13 at
19

20 ³ In a complaint, malice and intent may be alleged generally. F.R.Civ.P. 9(b).

1 8-9. Rather, Plaintiff claims it is enough to allege that Defendant acted wilfully or
2 maliciously by simply “making or issuing” “any statement” “that will tend to
3 influence or prejudice the mind of any employer against the person seeking
4 employment.” *See* Wash. Rev. Code § 49.44.010. Here, Plaintiff has alleged that
5 the two substantively identical letters sent by Defendant “falsely stated to ESD that
6 [Plaintiff] was terminated for being a thief and a fraudster.” Compl. at ¶ 4.4.

7 The plain language of the statute makes it abundantly clear that Plaintiff
8 must at a minimum allege sufficient facts to show that Defendant “published the
9 grounds for [her dismissal] or otherwise circulated h[er] name to prospective
10 employers *for the purpose of preventing plaintiff from securing employment.*”
11 *Cooper v. Univ. of Wash.*, No. C06-1365RSL, 2007 WL 3356809 at *8 (W.D.
12 Wash. Nov. 8, 2007)(emphasis added); Wash. Rev. Code § 49.44.010. Here, the
13 Court discerns no facts in Plaintiff’s Complaint indicating that the purpose of
14 Defendant’s letters to the ESD was to publish or circulate information to
15 prospective employers in order to prevent her from securing employment.

16 Even under Plaintiff’s theory that she is relying only on the portion of the
17 statute prohibiting “any statement” that would “tend to influence or prejudice the
18 mind of any employer against the person seeking employment,” Plaintiff does not
19 allege that she actively sought employment after the letters were sent to ESD, nor
20 that any prospective employer was even hypothetically influenced by the content

1 of the letters. Plaintiff categorically denies seeking employment, yet the statute
2 only protects “the person seeking employment.” Moreover, while Plaintiff
3 maintains any statement will suffice under the statute, she ignores that the statute at
4 bare minimum only prohibits those “who shall willfully and maliciously *make or*
5 *issue any statement* or paper.” RCW 49.44.010 (emphasis added). One cannot
6 make or issue any statement or paper in a void, it must be communicated to a
7 prospective employer or at least someone who communicates with prospective
8 employers, otherwise there is no chance “it will tend to influence or prejudice the
9 mind of any employer.”

10 Thus, the Court finds that Plaintiff fails to plead sufficient facts to support a
11 plausible blacklisting claim under RCW 49.44.010.

12 **D. Consumer Protection Act**

13 “Washington’s Consumer Protection Act was enacted to promote free
14 competition in the marketplace for the ultimate benefit of the consumer.” *Tanner*
15 *Elec. Co-op v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 684 (1996).
16 Plaintiff alleges that Defendant violated the CPA under two separate theories: (1)
17 unfair and deceptive acts or practices (RCW 19.86.020) and (2) conspiracy to
18 restrain trade (RCW 19.86.030). Compl. at 7-8. The Court will examine each
19 claim in turn.

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1 1. RCW 19.86.020

2 In order to prevail in a CPA action under RCW 19.86.020, a plaintiff must
3 establish five elements, including: “(1) unfair or deceptive act or practice; (2)
4 occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in
5 his or her business or property; [and] (5) causation.” *Hangman Ridge Training*
6 *Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780 (1986). Defendant
7 argues that Plaintiff fails to sufficiently allege (1) that Defendant has engaged in
8 any relevant unfair or deceptive act or practice, (2) that Defendant’s alleged
9 conduct impacts a substantial portion of the public, or (3) that Defendant’s alleged
10 conduct caused Plaintiff any injury to her business or property. ECF No. 12 at 11-
11 15.

12 With regard to the first three elements required to prevail on a CPA claim
13 under RCW 19.86.020, Defendant cites to Washington and federal cases holding
14 that an act or practice is actionable under the first two elements of the CPA only if
15 it has the “*capacity* to deceive a substantial portion of the public.” *See e.g.*,
16 *Hangman Ridge*, 105 Wash.2d at 785. However, as identified by Plaintiff, in 2013
17 the Washington Supreme Court held that “a claim under the Washington CPA may
18 be predicated upon a per se violation of statute, an act or practice that has the
19 capacity to deceive substantial portions of the public, or an unfair or deceptive act
20 or practice not regulated by statute but in violation of public interest.” *Klem v.*

1 *Washington Mut. Bank*, 176 Wash.2d 771, 787 (2013)(noting that the court did not
2 have the “opportunity to explore in detail how to define unfair acts for the purposes
3 of our CPA.”). Further, the court held that “false dating by a notary employee of
4 the trustee in a nonjudicial foreclosure is an unfair or deceptive act or practice and
5 satisfies the first three elements under the Washington CPA,” despite
6 acknowledging that the legislature had not yet declared it as a per se unfair or
7 deceptive act for the purposes of the CPA. *Id.* at 793-795 (emphasizing that it is a
8 crime in Washington for a notary to falsely notarize a document).

9 Plaintiff argues that the criminal statutes relied on for the basis of her
10 allegations are the “same kind” of criminal statutes as *Klem*. According to
11 Plaintiff, Defendant’s alleged false statement as to the nature of her termination,
12 evasion of contributions, concealments of mere negligence as the true cause of
13 discharge, and blacklisting, “are crimes AS WELL AS unfair or deceptive acts or
14 practices,” and therefore satisfy the first three elements of a Washington CPA
15 claim. ECF No. 13 at 12 (emphasis in original). Defendant perfunctorily responds
16 that neither the facts nor the holding of *Klem* are on point here, and insists that
17 Plaintiff has not pled sufficient facts to support her allegations that Defendant
18 violated any criminal statute. Moreover, Defendant argues that the CPA claim
19 fails as a matter of law because it impacts only the Plaintiff or a limited group, and
20 thus does not have the capacity to deceive a substantial portion of the public.

1 While the Court acknowledges Plaintiff's cogent argument regarding the
2 plausibility of her claim on the first three elements, it is unnecessary to address the
3 applicability of *Klem* in this case due to the conspicuous lack of sufficient facts to
4 adequately plead the fourth element of her CPA claim: injury to Plaintiff's
5 business or property. *See Hangman Ridge*, 105 Wash.2d at 780. The injury need
6 not be great, and the element "will be met if the consumer's property interest or
7 money is diminished because of the unlawful conduct even if the expenses caused
8 by the statutory violation are minimal." *Mason v. Mortgage America, Inc.*, 114
9 Wash.2d 842, 854 (1990)(noting that "injury" is distinguishable from "damages,"
10 thus, monetary damages need not be proven and non-quantifiable injuries may still
11 suffice to prove the fourth element).

12 The Complaint merely recites the fourth element with no additional facts
13 indicating any injury to Plaintiff's business or property. *See* Compl. at ¶ 6.5. It is
14 undisputed that despite the letter sent by Defendant to the ESD, Plaintiff
15 successfully received unemployment benefits until she began receiving financial
16 aid while attending community college. *Id.* at ¶ 3.13. She does not allege that she
17 sought work or was denied employment opportunities as a result of Defendant's
18 alleged acts. She does not allege that Defendant relayed information about her
19 termination to anyone other than ESD. In point of fact, under Washington law
20 information submitted to ESD related to unemployment proceedings "shall be

private and confidential” except in limited circumstances.⁴ *See* Wash. Rev. Code § 50.13.020. Moreover, Plaintiff explicitly acknowledges that she is not claiming wrongful termination, and her claims are based solely on post-termination actions. Compl. at ¶ 3.15. The Court declines to rely on *possible* injury to Plaintiff’s business or property at some undefined point in the future when she *might* suffer adverse action as a result of the letter to ESD, nor is mere speculation sufficient to properly allege the fourth element of a CPA claim. For all of these reasons, the Court finds that Plaintiff fails to sufficiently plead the fourth element of a CPA claim under *Iqbal* and *Twombly*.

2. RCW 19.86.030

Under RCW 19.86.030, “[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.” Wash. Rev. Code § 19.86.030. This provision is the state equivalent of the federal Sherman Antitrust Act, and the Washington Legislature anticipated its

⁴ Plaintiff highlights the exceptions to the privacy statute and argues information provided to the ESD is “not absolute locked up privacy so that lies cannot get out of ESD” especially “in today’s world where background checks find everything.” ECF No. 13 at 4-5. However, once again, Plaintiff does not allege that information has actually been sought or disseminated, nor that Plaintiff sustained injury as a result of any purported disclosure.

1 courts would be guided by federal interpretation of the corresponding federal
2 statute. *See State v. Black*, 100 Wash.2d 793, 799 (1984); *see also* Wash. Rev.
3 Code § 19.86.920. “To state a claim under § 1 of the Sherman Antitrust Act, a
4 plaintiff must show ‘(1) that there was a contract, combination, or conspiracy; (2)
5 that the agreement unreasonably restrained trade under either a per se rule of
6 illegality or a rule of reason analysis; and (3) that the restraint affected interstate
7 commerce.’” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991).
8 Additionally, a plaintiff must show that she suffered an injury resulting from the
9 allegedly illegal conduct. *See Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849
10 F.2d 1168, 1172 (9th Cir. 1988).

11 Plaintiff’s Complaint alleges that “[t]he acts and practices of Defendant and
12 TALX complained of herein are a contract, combination, or conspiracy in restraint
13 of trade in violation of RCW 19.86.030.” Compl. at ¶ 7.3. Further, Plaintiff
14 alleges that she is “in the business and trade of competing with other individual
15 persons in the State of Washington for the sale of her skills, labor, time, and talent
16 to prospective employees, contractors, vendors or customers.” *Id.* at ¶ 7.2. The
17 Court finds these threadbare recitals of the elements of a cause of action under
18 RCW 19.86.030 fail to state a plausible CPA claim under the pleading standards
19 set out in *Iqbal* and *Twombly*.

1 First, Plaintiff does not allege, nor can the Court discern, the specific
2 “contract, combination, or conspiracy” that would plausibly give rise to an antitrust
3 claim in this case. Second, Plaintiff does not allege an unreasonable restraint of
4 trade under either a per se rule of illegality or a rule of reason analysis. *See Bhan*,
5 929 F.2d at 1410 (outlining the proper analysis under each of these theories).
6 Instead, the Complaint contains a formulaic recital of this element of a claim under
7 RCW 19.86.030, with no specific facts to support a “restraint of trade” claim. In
8 order to meet her burden to establish an unreasonable restraint of trade under a rule
9 of reason analysis, plaintiff “must delineate a relevant market and show that the
10 defendant plays enough of a role in that market to impair competition
11 significantly.” *Id.* at 1413. Plaintiff appears to allege the relevant market is
12 competing with other individuals for the sale of her labor to prospective employers,
13 however, she does not make any allegation as to any significant anti-competitive
14 impairment by Defendant in that market. *See id.*; *see also* Compl. at ¶ 7.2.

15 Finally, Plaintiff only offers the conclusory assertion that these alleged acts
16 and practices “caused damage and injury to the business of property of [Plaintiff].”
17 Compl. at ¶ 7.4. However, the Court is once again unable to identify any injury to
18 Plaintiff’s business or property resulting from the alleged illegal conduct under
19 RCW 19.86.030. Plaintiff has not alleged that she is or was actively seeking
20 employment or competing with any other individual for employment in any form.

1 Rather, it appears that Plaintiff is currently pursuing her education. *Id.* at ¶ 3.13.

2 Thus, the Court finds that Plaintiff fails to sufficiently plead a cause of action
3 under RCW 19.86.030.

4 **E. Civil Conspiracy**

5 In order to establish a claim of civil conspiracy, a plaintiff must prove by
6 clear, cogent and convincing evidence, that

7 (1) two or more people combined to accomplish an unlawful purpose, or
8 combined to accomplish a lawful purpose by unlawful means; **and** (2) the
9 conspirators entered into an agreement to accomplish the conspiracy. Mere
10 suspicion or commonality of interests is insufficient to prove a conspiracy.
When the facts and circumstances relied upon to establish a conspiracy are
as consistent with a lawful or honest purpose as with an unlawful
undertaking, they are insufficient.

11 *All Star Gas, Inc., of Washington v. Bechard*, 100 Wash. App. 732, 740 (Ct. App.
12 2000)(internal citations and quotations omitted)(emphasis added). Defendant
13 argues that Plaintiff fails to set forth factual allegations to support a civil
14 conspiracy claim. Plaintiff's Complaint merely alleges that "the acts of
15 [Defendant] and TALX complained of herein constitute a combined effort to
16 accomplish a lawful purpose by unlawful means, or accomplish an unlawful
17 purpose by lawful means, to the injury of Plaintiff." Compl. at ¶ 8.2. Plaintiff
18 concedes that there is nothing inherently unlawful in Defendant challenging
19 Plaintiff's unemployment claim. ECF No. 13 at 15-16. However, Plaintiff argues
20 that this lawful purpose was accomplished by unlawful means, namely, false

1 statements that Plaintiff was discharged for “being a thief and a fraudster,”
2 concealing negligence as the true cause of her dismissal, and evading
3 contributions. *Id.* at 16. Defendant counters that the alleged “statements” made in
4 the letters sent to ESD were not false, and merely explained the circumstances
5 behind Plaintiff’s termination in the same manner they were described to her at the
6 time of her termination. ECF No. 14 at 7-8.

7 The Court recognizes that Plaintiff’s Complaint generally includes plausible
8 factual support as to the alleged falsity of the information provided by Defendant
9 to ESD. However, the Complaint merely sets forth a legal conclusion repeating
10 almost verbatim the elements to prove a civil conspiracy claim, without factual
11 support as to this particular claim. Most problematic is Plaintiff’s failure to allege
12 even a conclusory allegation that Defendant and TALX actively entered into an
13 agreement to accomplish the alleged conspiracy, as required under Washington
14 law. *See All Star Gas, Inc.*, 100 Wash. App. at 740. Plaintiff’s entire claim
15 appears to be focused on whether Defendant and TALX acted unlawfully, but she
16 neglects to provide any allegations that these two entities combined to accomplish
17 the alleged unlawful activity, much less entered an agreement to do so. Thus, the
18 Court finds the Complaint fails to state a plausible claim for civil conspiracy.

19 ///

20 ///

1 **F. “Breach of Promise”**

2 In her Complaint, Plaintiff claims that Defendant employee’s statement that
3 it would not “fight or contest [Plaintiff’s] application for unemployment, and
4 instead twice contesting her application in the manner alleged herein, constitute a
5 breach of that promise [Plaintiff] relied, to her detriment, on the promise and has
6 thus been placed in the present circumstances described herein.” Compl. at ¶ 9.2.

7 At oral argument, Plaintiff clarified that this was a promissory estoppel claim.

8 The five elements required to prove a claim of promissory estoppel are: (1) a
9 promise (2) which the promisor should reasonably expect to cause the promisee to
10 change his position (3) which does cause the promisee to change his position (4)
11 justifiably relying upon the promise, in such a manner (5) that injustice can be
12 avoided only by enforcement of the promise. *See Corbit v. J.I. Case Co.*, 70
13 Wash.2d 522, 538 (1967). The Court finds that Plaintiff fails to allege any facts
14 showing that this statement caused her to change her “position” or that she relied
15 on the alleged promise to her detriment. Once again, Plaintiff received
16 unemployment benefits regardless of any alleged representations made by
17 Defendant that it would not contest her application. Thus, the Court can perceive
18 no “injustice” that would have been avoided if the alleged promise by Defendant
19 was enforced. The Court finds Plaintiff fails to state a plausible claim for
20 promissory estoppel.

G. Negligent Infliction of Emotional Distress

As with any other negligence claim, in order to prevail on a negligent infliction of emotional distress (“NIED”) claim, a plaintiff must prove the existence of a duty, breach of that duty, proximate cause, and damage or injury. *See Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wash.2d 233, 243 (2001). Additionally, to establish a negligent infliction of emotional distress claim a plaintiff’s emotional response must be reasonable under the circumstances, and must be corroborated by objective symptomatology.” *Hegel v. McMahon*, 136 Wash.2d 122, 133 (1998). To satisfy the objective symptomatology requirement, the “emotional distress must be susceptible to medical diagnosis and proved through medical evidence.” *Id.* at 135 (symptoms must constitute a diagnosable emotional disorder).

Defendant argues that Plaintiff did not plead facts sufficient to establish a breach of duty, nor has she pled facts to support the claim that she suffered damages as a result of Defendant’s alleged conduct. The parties acknowledge that generally “there is nothing unlawful or improper in an employer challenging an unemployment claim.” *Bayha v. Lampson*, No. 26461-1-III, 2009 WL 2748897 at *6 (Wash. Ct. App. Sept. 1, 2009). However, Plaintiff reiterates her argument that in the context of challenging an unemployment claim Defendant had statutory duties to provide truthful information to ESD regarding the cause of her discharge,

1 not to evade contributions, and not to conceal the true cause of her termination.⁵

2 *See* Compl. at ¶ 10.2.

3 Moreover, in her Complaint, Plaintiff alleges that her distress was
4 “reasonable and justified under the circumstances” and that Defendant’s actions
5 caused her weight loss, loss of sleep, headaches, and other physical symptoms. *Id.*
6 at ¶ 4.5. Plaintiff also states she has begun psychological counseling through her
7 church. *Id.* However, the alleged “reasonableness” of her response is not
8 corroborated by any allegation that her emotional distress was susceptible to
9 medical diagnosis. *See Hegel*, 136 Wash.2d at 135. Plaintiff’s Complaint does not
10 include any allegation that she has been treated by a medical practitioner for these
11 alleged “symptoms.” The Court is further compelled to note that aside from the
12 entirely conclusory allegation that Defendant “proximately caus[ed] damage to

13 ⁵ In her responsive briefing, Plaintiff also argues that Defendant has a “self-
14 imposed duty to not fight unemployment” presumably based on the alleged
15 promise by a Defendant employee analyzed above; and a duty to “not ... have its
16 law firm whipsaw [Plaintiff] between the choices of either taking a pittance
17 settlement for these valuable claims or spending to defend [Defendant’s] dubious
18 lawsuit.” ECF No. 13 at 18-19. However, Plaintiff presents no authority to support
19 the existence of these “duties,” and thus the Court declines to consider these
20 arguments.

1 [Plaintiff] and negligently inflict[ed] emotional distress upon her,” it is unclear
2 from the Complaint precisely which act or acts by Defendant were the proximate
3 cause of her alleged emotional distress. *See Strong v. Terrell*, 147 Wash. App. 376,
4 388 (2008)(in order to establish proximate cause, plaintiff must prove that the
5 negligent conduct caused the injury in a direct sequence, with no intervening
6 independent cause). For all of these reasons, the Court finds that Plaintiff’s
7 Complaint fails to provide the necessary facts to plead a plausible claim of NIED.

8 **H. Leave to Amend**

9 Even when a complaint fails to state a claim for relief, “[d]ismissal without
10 leave to amend is improper unless it is clear that the complaint could not be saved
11 by an amendment.” *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009). The
12 standard for granting leave to amend is generous. See Fed. R. Civ. P. 15(a)(2)
13 (“The court should freely give leave when justice so requires.”). The court
14 considers five factors in assessing the propriety of leave to amend—bad faith,
15 undue delay, prejudice to the opposing party, futility of amendment, and whether
16 the plaintiff has previously amended the complaint. *United States v. Corinthian*
17 *Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

18 The Court finds no indication of bad faith, undue delay, or prejudice to the
19 opposing party, nor have Plaintiffs previously amended their Complaint. Thus, the
20 only factor left for the Court to weigh is whether an amendment would be futile.

1 Futility is established only if the complaint “could not be saved by any
2 amendment.” *Id.* (internal citations omitted). At this early stage of the proceeding,
3 the Court can conceive of additional facts that could provide plausible support for
4 Plaintiff’s claims. *See id.* Consequently, leave to amend the Complaint is granted.

5 **ACCORDINGLY, IT IS HEREBY ORDERED:**

6 1. Defendant Target Corporation’s Motion to Dismiss Pursuant to FRCP
7 12(b)(6), ECF No. 12, is **GRANTED**.

8 2. Plaintiff is **GRANTED** leave to file an amended complaint within **thirty**
9 **(30) days** of the entry of this order.

10 The District Court Executive is hereby directed to enter this Order and
11 provide copies to counsel.

12 **DATED** July 10, 2013.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge